Supreme Court, U. S.
FILED
OCT 31 1980
MICHAEL RODAK, JR., CLERK

No. 80-256

SUPREME COURT OF THE UNITED STATES

October, 1980 Term

RODNEY BRUCE GLENN - - - - Petitioner

versus

ROSE L. SHIPP
DAVID ARMSTRONG
PAUL RICHWALSKY - - - - Respondents

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT PAUL RICHWALSKY

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QUESTION PRESENTED

Whether prosecuting attorneys have immunity from claims for damages asserted against them under the Civil Rights Act, 42 U.S.C. § 1983 and § 1985, where it is not alleged that the prosecuting attorneys were acting other than in their role and capacity as prosecuting attorneys.

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ROSE L. SHIPP
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PAUL RICHWALSKY - - - - *Respondents*

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT PAUL RICHWALSKY

STATEMENT OF THE CASE

Respondent, Paul Richwalsky, accepts as being substantially correct, the Statement of the Case contained in the Response of Co-Respondents Shipp and Armstrong.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Respondent prosecutors are legally immune from litigation of the type brought by the Petitioner herein.

The Respondent, Paul Richwalsky, hereinafter referred to as Richwalsky for the sake of clarity, at the outset of his brief, wishes to advise this Court that it is not his intention to be repetitive of his co-Respondent's brief. That brief very ably set forth much, if

not most, of the procedure and law believed to be governing or controlling in this litigation. There are, however, a few additional points of law which Richwalsky believes are deserving of the Court's consideration. This this extent, then, it is Richwalsky's intention to supplement the brief heretofore filed by his co-Respondents, Shipp and Armstrong.

Richwalsky recognizes that this Court, in deciding *Imbler* v. *Pachtman,* 424 U. S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976), did not intend to confer absolute immunity upon prosecutors for any and all conceivable acts or actions that a prosecutor might make or take. By its decision in that case, this Court preserved the prosecutorial immunity for those acts or actions taken within the scope of the judicial arena but reserved considerations of immunity concerning a prosecutor's "role of administrator or investigative officer." *Imbler, supra,* pp. 430-431.

However, in order to appreciate this appeal in its full perspective, it is urged that a consideration must be given to the facts which were alleged by the Petitioner. Only then can this Court be assured that the District Court reached a proper conclusion by the dismissal of the litigation against the prosecutors, which was then affirmed by the United States Court of Appeals for the Sixth Circuit.

The thrust of the litigation against the prosecutors in this matter is contained in numerical paragraphs 37 through 48 of the Complaint filed by the then Plaintiff, now Petitioner (App., pp. 31-35). In substance, it is alleged that the prosecutors 1) conspired to cause a

search warrant to be issued for the personal and business effects of the Petitioner; 2) had the Petitioner indicted by a Grand Jury; 3) caused the Petitioner, Rodney Bruce Glenn, to be extradited and a high bond to be set in his case; and 4) retained Petitioner's property after Petitioner obtained a Court Order for the return of the property. These specifics represent the very essence of Petitioner's allegations against the prosecutors.

Utilizing no more than the Petitioner's original Complaint, it is urged that nothing is recited in that Complaint which would afford Glenn any relief against the prosecutors. Of the four alleged Civil Rights violations, only the last one contains facts which did not involve an intervening cause that was completely independent of the prosecutorial function.

The search warrant complained of in numerical paragraph 39 of the Complaint was issued by a Judge of the Circuit Court, and was not of the type issued and signed by a prosecutor, as denounced by this Court in *Coolidge* v. *New Hampshire,* 403 U. S. 433, 29 L. Ed. 2d 564, 91 S. Ct. 2022, (1971). Consequently, it must be realized that a Judge, an intervening authority who was completely independent of the prosecutors, weighed the probable cause aspects of an Affidavit and, after such due deliberation, was apparently satisfied that the requisite probable cause existed for the issuance of such a warrant. Therefore, absent an allegation of collusion between the Judge and prosecutors there can be no claim of any deprivation of rights. Simply stated, the signing of the search warrant in this case was a judicial

act by a person whose chief function is to protect the rights of persons, places or things.

Glenn's next Civil Rights contention was that the prosecutors conspired to have Prosecutor Shipp "appear and testify before the July, 1976 term of the Jefferson County Grand Jury to procure (an) Indictment of the Plaintiffs" (App., p. 32). It must be noted that there was no allegation that Mrs. Shipp engaged in perjury before this Grand Jury, although it is now so alleged in the Petition at p. 5. Once again it is important to realize that a Grand Jury is an independent body that examines evidence and considers testimony from witnesses, after which it votes on the matters before it. On this point, Richwalsky calls the Court's attention to Kentucky Rule of Criminal Procedure 5.10 (RCr) which states:

> The Grand Jury shall find an indictment where they have received what they believe to be sufficient competent evidence to support it, but no indictment shall be quashed or judment of conviction reversed on the ground that there was not sufficient competent evidence before the Grand Jury to support the indictment.

It is further believed that RCr 5.14 concerning the duties of the prosecuting attorney is instructive. That Rule states:

> (1) The attorney for the Commonwealth, or his assistant, designated by him, shall attend the grand jurors *when requested by them,* and he may do so on his own motion, for the purpose of examining

witnesses in their presence, or of (sic) giving the grand jurors legal advice regarding any matter cognizable by them. He shall also, *when requested by them,* draft indictments. (Emphasis added.)

(2) The grand jurors may at any time question witnesses in a closed session.

It was the Grand Jury who returned the Indictment against the Petitioner, not the prosecuting attorneys proceeding on their own through an Information. Any complaint about the Indictment in this case should be addressed to the Grand Jury, not to the prosecutors.

Interestingly enough, the Petitioner next complained, in numerical paragraphs 41 and 42, that "the statute of limitations for said crime had already run" and that the bond for the crime "was set at the unreasonable sum of $50,000.00 cash." (App., p. 32). Statutes of limitations are defenses to be specifically pled and are not complete bars to actions. In criminal cases, statutes of limitations have been held to be an act of grace or a surrendering by the government of its right to prosecute. *People* v. *Ross,* 156 N. E. 303, 304, Ill., 1927. Without doubt, if the Petitioner had failed to specifically plead the running of the statute of limitations, he would have faced trial on the charge.

The complaint about unreasonable bail must fail as well because it is the Court that establishes the specific financial conditions of bail, not the prosecutors. It is unquestionably true that prosecutors are called upon to make recommendations to the Court about bail in par-

ticular cases, as was probably the situation here, but the ultimate responsibility for setting bail always rests with the Court. Moreover, if a particular criminal defendant believes that bail is excessive, remedies are available to him for relief through such legal instruments as Writs of Mandamus or Habeas Corpus, as examples.

The remaining act of the prosecutors which the Petitioner tried vainly to raise to a violation of Civil Rights involved the failure of the prosecutors to abide by "an Order of the Jefferson Circuit Court for the return of all properties being held by the Office of the Commonwealth Attorney of Jefferson County." (App., p. 33). Richwalsky submits that this allegation, if it were true in its premises, should have been the easiest issue of all for the Petitioner to resolve because adequate remedies at law were available to the Petitioner —remedies which are still available for that matter, of the complainant is in fact, really wronged. It would or should be a relatively simple matter for the Petitioner to file a motion with the Jefferson Circuit Court to require the prosecutor(s) to show cause why she or they should not be held in contempt of Court for failing to comply with a valid order of that Court. That Court, then, could get to the heart of that issue in relatively short order.

Without a doubt, the activities of the prosecution officers alleged in the Complaint of the Petitioner, if true, would be outside the scope of the Supreme Court's decision in *Imbler* v. *Pachtman, supra.* Further, it is conceded that by strict definition these alleged activi-

ties would come within the categories of administrative and/or investigative duties in that it is the normal function of a prosecutor's office to assist in the marshalling of evidence in a case brought to them; making judgments about the prosecutorial merits of a case; assisting in the presentation of a case before a Grand Jury in those cases deemed worthy of consideration by that body; initiating proceedings for the return of persons indicted who are in other jurisdictions; participating in bail hearings involving defendants seeking such relief; and finally representing the sovereign as its advocate in trial. To this described extent, it is difficult to really separate the functions of the office of the prosecutor since, by its very nature, it involves administrative, investigative and advocacy roles. Such an office would ill function if these various roles were trisected with independent functionaries at the helm of each.

If the prosecutors in this case had the powers attributed to them by the Petitioner then perhaps this would fit within the exceptions reserved for future decision by this Court in *Imbler, supra,* pp. 430-431. However, that power simply did not exist in this case. The Grand Jury made the decision to indict the Petitioner and Judges made the decisions to sign search warrants and set bail — decisions of an entirely independent nature. Any other interpretation, it would seem, would imply that prosecutors are puppeteers and Grand Juries and Judges are puppets.

Based upon the considerations heretofore discussed, it is Richwalsky's belief that the matter has, in effect,

now come full circle to the return to this Court's decision in *Imbler, supra,* and the District Court's dismissal of the matter herein predicated upon that decision. In the absence of the four issues previously detailed there remains only the generalized allegation about the Petitioner being "free from malicious prosecution," which may or may not apply to the trial proceedings. (App., p. 33). If the phrase does apply to the issues already articulated by the Petitioner, then no further discussion is needed. However, if that phrase applies to the trial itself, then surely that allegation is clearly disposed of by the decision in *Imbler, supra.*

Respondents, Shipp and Armstrong, have discussed the Circuit Court of Appeals' cases cited by the Petitioner. Consequently, Richwalsky, choosing not to be redundant would only agree that the facts of those cases are, he believes, clearly distinguishable from the facts of this case. Here, the decision to indict was made by the Grand Jury; the decision on the sufficiency of the search warrant affidavit and about bail was that of a Judge — all constitutional bodies or offices vested with the authority to act as they did, and for these reasons it is urged that the Complaint of the Petitioner cannot be sustained under any existing legal theory.

CONCLUSION

The Petitioner is placing an improper construction upon the various Court's interpretations of prosecutorial immunity. In an effort to give viability to his

litigation he is trying to persuade this Court that any actions outside the scope of the actual trial itself are areas of liability of prosecutors. Such broad interpretations are absolutely incorrect. It is believed that the Petitioner wants to be able to engage in a fishing expedition, which the very language of the Complaint allegations simply will not justify.

While this Court has not finally decided what degree of immunity, if any, a prosecutor may enjoy in the role of administrator or investigator, Richwalsky realizes that such decisions will take into consideration the particular or peculiar circumstances or facts of the prosecutorial role. Normally, it is true, many facts must be developed after the filing of the suit. Here, however, pertinent facts are contained in the Complaint itself. The Petitioner tries to blame prosecutors for the constitutionally approved actions of others. On the face of the Complaint, the dismissal was proper.

WHEREFORE, Richwalsky respectfully prays that this Court, after due deliberation and consideration, will affirm the Judgments of the District Court and the United States Court of Appeals for the Sixth Circuit, by denying the Petition for Writ of Certiorari.

Respectfully submitted,

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Louisville, Kentucky 40202

Counsel for Respondent,
Paul Richwalsky

CERTIFICATE OF SERVICE

It is certified that three (3) copies of the foregoing Brief for Respondent, Paul Richwalsky, were personally delivered to the offices of Hon. Charles D. Kaplan and Hon. S. Arnold Lynch, 414 Marion E. Taylor Building; and, Hon. Henry A. Triplett, 231 South Firth Street, all of Louisville, Kentucky 40202, this the 20 day of Oct., 1980.

JOSEPH G. GLASS
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